Indah Water Konsortium Sdn Bhd v Yong Kon Fatt

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A–04–212 OF 2004
JAMES FOONG, ZALEHA ZAHARI AND HELILIAH JJCA
16 MARCH 2007

Civil Procedure — Affidavits — Affidavit in reply — Failure to reply in an application to strike out statement of claim — Whether constituted admission of said fact — Whether magistrate could order full trial of the case in the face of the unchallenged affidavit evidence — Whether failure to reply fatal

Civil Procedure — Pleadings — Striking out writ and statement of claim, application for — Failure to reply to defendant's affidavit to strike out — Whether there was failure to plead particulars on the mode/basis of calculation of sewerage services — Sewerage Services Act 1993 read with Sewerage Services (Charges) Regulations 1994

Civil Procedure — Striking out — Statement of claim — Failure to reply to defendant's affidavit — Whether plaintiff required in law to adduce evidence by affidavit to make out a reasonable prima facie cause of action or triable issue of fact

The plaintiff/appellant instituted proceedings against the defendant/respondent claiming a sum of RM1,074 for non-payment of charges in respect of sewerage services provided by the appellant, which claim the respondent disputed. The said services were rendered pursuant to the Sewerage Services Act 1993 ('the said Act') and the rules and regulations made thereunder. The respondent denied the claim and insisted that the appellant had never provided the said services nor sent him any bills. Subsequent to the filing of his defence, the respondent applied to strike out the plaintiffs summons and statement of claim under O 14 r 21(1) of the Subordinate Courts Rules 1980 ('SCR') and averred that: (a) the appellant did not provide the said services to the respondent's premises and that the respondent had no contractual relationship with the appellant; (b) the appellant had no basis in law to claim from the respondent and; (c) the appellant does not possess any right to claim from him. The appellant did not file any affidavit-in-reply. The respondent's striking out application was dismissed by the magistrate. The learned High Court judge justified his decision to entertain this appeal as there were questions of law relating to the Act and the rules and regulations to be decided. As for the substantive matter under appeal, he held that since the appellant did not file an affidavit in reply to the allegations of the respondent contained in the respondent's affidavit which were: the said services were never provided by the appellants to the respondent and neither were any bills sent to the respondent, these allegations were deemed admitted by the appellant.

Held, allowing the appeal:

(1) (per **James Foong JCA**) When the application for striking out ought to be dismissed in limine, the failure of the appellant to file an affidavit in rebuttal to the averments of the respondent was irrelevant. The stage for the consideration of this had not arrived. The respondent must first prove to the court that his averment supports the grounds relied on by him for striking out. Failure to satisfy this preliminary step would result in the dismissal of the application without the need to consider other matters (see para 16).

(2) (per **James Foong JCA**) The second and third averments of the respondent could be condensed into an assertion that the appellant had no legal right to claim against the respondent. But this assertion, standing on its own without any qualification and explanation was just a bare statement. In order to give effect to it, reason must be supplied. Since no reason followed these averments giving rise to this bare statement then such averments had to be considered in the light of an earlier averment in the affidavit which was: since the appellant did not provide the said services, the parties could not have a contractual relationship with each other to permit the appellant to claim against the respondent. When these averments were dependent on the earlier averment and the earlier averment was inappropriate and improper to support the two grounds relied on by the respondent then the application based on these subsequent averments must fail for want of correct ground. The issue of the absence of an affidavit by the appellant to rebut the assertions made by the respondent in his affidavit once again should not have been considered at this stage (see para 17).

(3) (per **Zaleha Zahari JCA**) Consideration must be given to the fact the affidavit in issue in this case merely repeats the contentions in the defence. The absence of particulars as to the mode/basis of the calculation of the services alleged to have been supplied was also not one of law, but one of procedure. The absence of particulars as to the mode/basis of calculation of the sewerage services did not warrant the drastic step of striking out of the appellant's claim bearing in mind the principle that pleadings were to contain only a statement in summary form of the material facts relied upon, not the evidence by which those facts are to be proved (see paras 30–31).

(4) (per **Zaleha Zahari JCA**) There clearly were bona fide triable issues. This was not a plain and obvious case where the summary process under O 14 r 21(1) of the SCR should be invoked. Whether the appellant did in fact provide the sewerage services in issue to the respondent, and if so, for what period, and the quantum payable which can only be resolved by taking viva voce evidence at trial (see para 34).

(5) (per **Heliliah JCA**) Section 7 of the said Act is an enabling provision that empowers the federal government to enter into an agreement with any sewerage services contractor and thereby authorising the latter to provide, inter alia, sewerage services. The court took notice of PU(A) 116/1994 whereby the plaintiff had been authorised as a licensed sewerage services contractor to demand sewerage charges. It could not be the case as contended by the defendant that the plaintiff had averted to contractual provisions. The plaintiff

here had been vested through statutory provisions and an agreement with the government to discharge certain services to the public. An analysis of the aforementioned by itself would suffice to indicate that the denials raised by the defendant to the statement of claim could not simply be resolved by affidavit evidence. These matters were indeed triable matters (see paras 50, 54 & 56).

(6) (per **Heliliah JCA**) The contention that there was a joinder of issues on the claims of the plaintiff in respect of which a reply was not filed in response to the defence filed by the defendant had become implicit in the present proceedings. Here the situation arose from the lack of response or the failure to provide details as contended. It could not be said that the plaintiff had not established facts which were necessary for the purpose of formulating a complete cause of action. It was not a case here of conflicting affidavits but one alleged to be for a lack of it. The learned High Court judge had treated the matter as though the claim of the plaintiff must necessarily be resolved by a trial on affidavit and accordingly exercised his discretion. However in the exercise of the discretion to strike out the claim the learned High Court judge had failed to have due regard to the legislation that had been relied upon as the basis of the plaintiff's claim. It therefore warrants an intervention by the court in the interests of justice (see paras 60–62, 64).

[Bahasa Malaysia summary

Plaintif/perayu memulakan tindakan terhadap defendan/responden menuntut jumlah RM1,074 atas ketidakbayaran caj-caj yang berhubung dengan perkhidmatan penapisan pembetungan yang dibekalkan oleh perayu, yang mana responden mempertikaikan tuntutan tersebut. Perkhidmatan tersebut dibekalkan menurut Akta Perkhidmatan Pembentungan 1993 ('Akta tersebut') dan kaedah-kaedah dan peraturan-peraturan yang dibuat di bawahnya. Responden menafikan tuntutan tersebut dan menegaskan bahawa perayu tidak pernah membekalkan perkhidmatan tersebut dan tidak menghantar kepadanya sebarang bil. Selepas memfailkan pembelaannya, responden memohon untuk membatalkan saman dan pernyataan tuntutan plaintif di bawah A 14 k 21(1) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') dan menegaskan bahawa: (a) perayu tidak membekalkan perkhidmatan tersebut ke premis responden dan responden tiada hubungan kontraktual dengan perayu; (b) perayu tidak mempunyai sebarang asas undang-undang untuk menuntut daripada responden dan; (c) perayu tidak mempunyai sebarang hak untuk menuntut daripadanya. Perayu tidak memfailkan sebarang afidavit jawapan. Pembatalan permohonan responden ditolak oleh majistret. Hakim Mahkamah Tnggi yang bijaksana menjustifikasikan keputusan untuk membenarkan rayuan tersebut atas soal undang-undang yang berhubung dengan Akta tersebut serta kaedah-kaedah dan peraturan-peraturan untuk diputuskan. Untuk perkara substantif di bawah rayuan tersebut, beliau memutuskan bahawa oleh kerana perayu tidak memfailkan afidavit jawapan terhadap pengataan-pengataan yang terkandung di dalam afidavit responden iaitu: bahawa perkhidmatan tidak pernah dibekalkan oleh perayu kepada responden dan tiada sebarang bil-bil yang dihantar kepada responden, maka pengataan-pengataan tersebut dianggap telah diakui oleh perayu.

Diputuskan, membenarkan rayuan tersebut:

(1) (oleh **James Foong HMR**) Apabila permohonan patut dibatalkan in limine, kegagalan perayu memfailkan satu affidavit menafikan penegasan-penegasan responden adalah tidak relevan. Peringkat untuk mempertimbangkannya masih belum tiba. Responden mesti terlebih dahulu membuktikan kepada mahkamah bahawa penegasan-penegasannya menyokong alasan-alasan yang responden bergantung kepada untuk membatalkan permohonan tersebut. Kegagalan memenuhi langkah pertama ini akan menyebabkan permohonan tersebut ditolak tanpa perlu mempertimbangkan perkara-perkara lain (lihat perenggan 16).

(2) (oleh **James Foong HMR**) Penegasan-penegasan kedua dan ketiga responden dapat digabungkan kepada penegasan bahawa perayu tidak mempunyai hak undang-undang untuk menuntut terhadapnya. Akan tetapi penegasan ini, dengan sendirinya tanpa sebarang syarat dan penjelasan adalah hanya pengataan kosong. Untuk memberikan kesan kepadanya, alasan mesti dibekalkan. Oleh kerana tiada alasan yang mengikut penegasan-penegasan yang membangkitkan pengataan kosong tersebut, maka penegasan-penegasan tersebut mesti dipertimbangkan dengan penegasan pertama di dalam affidavit tersebut iaitu: oleh kerana perayu tidak membekalkan perkhidmatan tersebut, pihak-pihak tidak mempunyai perhubungan kontraktual antara satu sama lain untuk membenarkan perayu menuntut terhadap responden. Apabila penegasan-penegasan tersebut bergantung atas penegasan yang terdahulu dan penegasan yang terdahulu adalah tidak sesuai dan salah untuk menyokong kedua-dua alasan yang responden bergantung kepada tersebut, maka permohonan yang berdasarkan atas penegasan-penegasan seterusnya mestilah gagal oleh kerana ketidak adanya alasan yang betul. Isu tiada affidavit oleh perayu untuk mempertikaikan penegasan-penegasan yang dibuat oleh responden dalam afidavitnya tidak sepatutnya dipertimbangkan pada peringkat ini (lihat perenggan 17).

(3) (oleh **Zaleha Zahari HMR**) Pertimbangan harus diberikan kepada fakta bahawa affidavit tersebut dalam kes ini hanya mengulangi pendapat di dalam pembelaan. Ketiadaan butir-butir akan cara/asas pengiraan perkhidmatan yang dikatakan telah dibekalkan bukannya satu undang-undang, tetapi prosedur. Ketiadaan butir-butir akan cara/asas pengiraan perkhidmatan penapisan pembentungan tidak mewarankan langkah yang drastik dalam membatalkan tuntutan perayu, pada masa yang sama meneliti prinsip bahawa pliding-pliding seharusnya mengandungi hanya pernyataan di dalam bentuk ringkas berkenaan dengan fakta-fakta material pihak tersebut bergantung kepada, bukannya keterangan di mana fakta-fakta tersebut dibuktikan (lihat perenggan 30–31).

(4) (oleh **Zaleha Zahari HMR**) Adalah jelas terdapat isu-isu bona fide yang harus dibicarakan. Ini bukannya satu kes yang jelas dan nyata dimana proses terus di bawah A 14 k 21(1) KMR patut dipakai. Sama ada perayu sebenarnya membekalkan perkhidmatan penapisan pembentungan tersebut kepada responden, dan sekiranya ada, untuk berapa tempoh, dan kuantum yang perlu dibayar yang hanya dapat diselesaikan dengan keterangan viva voce diperbicaraan (lihat perenggan 34).

(5) (oleh **Heliliah HMR**) Seksyen 7 Akta tersebut adalah satu peruntukan yang memberi bidang kuasa kepada kerajaan persekutuan untuk memasuki satu perjanjian dengan sebarang kontraktor perkhidmatan penapisan pembentungan dan dengan itu member kuasa kepada kontraktor untuk membekalkan, di antara yang lain, perkhidmatan penapisan pembentungan. Mahkamah mengambil notis akan PU(A) 116/1994 di mana plaintif telah diberi kuasa sebagai satu perkhidmatan penapisan pembentungan berlesen untuk menuntut caj-caj penapisan pembentungan. Ia bukannya satu kes seperti yang ditegaskan oleh defendan bahawa plaintif telah menggunakan peruntukan kontraktual. Plaintif di sini diletakhak melalui peruntukan perundangan dan satu perjanjian dengan kerajaan untuk memberikan sesuatu perkhidmatan kepada orang awam. Satu analisa perkara di atas akan dengan sendirinya adalah mencukupi untuk menunjukkan bahawa penafian-penafian yang dibangkitkan oleh defendan terhadap pernyataan tuntutan tidak boleh diselesaikan melalui keterangan afidavit. Perkara-perkara ini sebenarnya adalah perkara-perkara yang perlu dibicarakan (lihat perenggan 50, 54 & 56).

(6) (oleh **Heliliah HMR**) Penegasan bahawa terdapat satu penyatuan isu-isu di atas tuntutan plaintif berhubung dengan jawapan yang tidak difailkan untuk menjawab pembelaan yang difailkan oleh defendan telah menjadi tersirat di dalam prosiding ini. Di sini satu situasi berbangkit daripada ketiadaan jawapan atau kegagalan memberikan butir-butir seperti yang ditegaskan. Ia tidak boleh dikatakan bahawa plaintif tidak membuktikan fakta-fakta yang perlu untuk tujuan pembentukan satu kausa tindakan yang sempurna. Di sini bukannya satu kes di mana afidavit-afidavit adalah bertentangan tetapi di mana terdapat kekurangan. Hakim Mahkamah Tinggi yang bijaksana telah menganggap perkara tersebut seolah-olah tuntutan plaintif seharusnya diselesaikan melalui satu perbicaraan atas afidavit dan dengan itu menggunakan budi bicaranya. Akan tetapi dalam penggunaan budi bicara untuk membatalkan tuntutan tersebut hakim Mahkamah Tinggi yang bijaksana telah gagal memberi perhatian kepada undang-undang yang dipakai sebagai asas tuntutan plaintif. Dengan itu ia mencukupi untuk campur tangan mahkamah demi kepentingan keadilan (lihat perenggan 60–62, 64).]

Notes

For cases on affidavit in reply, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 319–330.

For cases on application for striking out writ and statement of claim, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5805–5810.

For cases on striking out of statement of claim, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6750–6786.

Cases referred to

AG of Duchy of Lancaster, Re v London & North Western Railway Co [1892] 3 Ch 274 (refd)

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 (refd)

Bandar Builder Sdn Bhd & Ors v United Malaya Banking Corporation Bhd [1993] 3 MLJ 36 (refd)

Cheow Chew Khoon v Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457 (refd)

Honan Plantation Sdn Bhd v Kerajaan Negeri Johor & Anor and another appeal [1998] 2 MLJ 498 (refd)
Lecthumi & Anor v Asia Insurance Co Ltd [1972] 2 MLJ 105 (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng [1995] 1 MLJ 719 (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)
Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 332 (refd)
Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor v Karambunai Resort Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 MLJ 309 (refd)
Perwira Affin Bank Bhd v Ahmad bin Abdul Rahman [1999] 5 MLJ 306 (refd)
Ronex Properties Ltd v John Laing Construction Ltd [1983] 1 QB 398 (refd)
Saminder v PP [1972] 1 MLJ 28 (refd)
Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533 (refd)
Tan Kim Hor v Tan Heng Chew [2003] 1 MLJ 42 (refd)
Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 28(1)
Evidence Act 1950 s 57(1)(a)
Federal Constitution art 160(2)
Interpretation Acts 1948 and 1967 ss 3, 40
Rules of the Court of Appeal 1994 rr 18(2), 21(1)
Rules of the High Court 1980 O 18, O 19
Subordinate Courts Rules 1980 O 14 rr 10, 20(1), (2), (3), 21(1)(a), (b), (d)
Sewerage Services (Authorisation of Collection of Charges) Order 1994 para 2
Sewerage Services (Charges) Regulations 1994 reg 7
Sewerage Services Act 1993 ss 4, 5, 6, 7, 30(2)

Appeal from: Civil Appeal No 11–56 of 2003 (High Court, Ipoh)

Wong Kian Kheong (Alex Tan Chie Sian with him) (Azlan Shah Shaikh & Rashidi) for the appellant.
Nga Hock Cheh (Ngeh Khoo Hau, Nga Kor Ming and Nasrul Ghazali Idris with him) (Nga Hock Cheh & Co) for the respondent.

James Foong JCA:

INTRODUCTION

[1] The appellant had filed a summons in the Magistrate's Court in Lumut, Perak against the respondent for a sum of RM1,074 for sewerage services (the said services) provided by the appellant to the respondent as stated in various bills forwarded to the respondent. The said services were rendered pursuant to the Sewerage Services Act 1993 ('the said Act') and the rules and regulations made thereunder.

[2] The respondent had filed his defence denying this claim and insisted that the appellant has never provided the said services nor sent him any bills.

[3] Subsequent to the filing of his defence, the respondent applied to the magistrate court (the application) to strike out the plaintiffs summons and statement of claim under O 14 r 21 (1) of the Subordinate Courts Rules1980 ('SCR') on the grounds that the appellant's claim is frivolous and an abuse of the court's process. In his affidavit in support, the respondent affirmed as follows:

(a) that he has never requested for the said services to be provided to his premises and he has no contractual relationship with the appellant;

(b) that he has been advised by his solicitors that the appellant does not possess any right in law to claim against him;

(c) that he has further been advised by his solicitors that the plaintiff has no right to claim against him in law.

[4] The appellant did not file any affidavit in reply.

[5] On the 2 October 2003, the magistrate dismissed the application with costs. Dissatisfied with this outcome, the respondent appealed to the High Court.

[6] The learned High Court judge entertained this appeal despite the claim involved is below RM10,000. He allowed the appeal with costs. This is reported in [2006] 1 AMR 363; [2006] 1 MLJ 180 and [2005] 4 CLJ 193. As a result of his decision, the appellant brought this appeal before us.

[7] After hearing this appeal on 15 January 2007, we reserved judgment. On 16 March 2007, we delivered our unanimous decision allowing this appeal with costs here and below. We also set aside the order of the High Court and affirmed the order of the magistrate given on 2 October 2003. I now give my reasons for doing so. But first, allow me to disclose the primary grounds proffered by the learned High Court judge in ruling in favour of the respondent.

GROUNDS ADVANCED BY THE HIGH COURT

[8] In his grounds of judgment, the learned High Court Judge first justified his decision to entertain this appeal. He was of the view that though the amount claimed is below RM10,000 there are questions of law involving the said Act and the regulations made thereunder to be decided.

[9] As for the substantive matter under appeal, he held that since the appellant did not file an affidavit in reply to the allegations of the respondent contained in the respondent's affidavit which were: the said services were never provided by the appellants to the respondent and neither were any bills sent to the respondent, these allegations are deemed admitted by the appellant. For support, the learned High Court Judge cited the following cases: see *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332; *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533.

[10] The said Judge then declared that the 'plaintiffs statement of claim does not contain any particulars as to the period when the services were provided and the basis of the amount calculated to warrant the levy of RM1,074 so as to give sufficient notice of the claim and consequently that itself obviously calls for a rebuttal evidence by an affidavit in reply by the plaintiff to the defendant's application to strike out the plaintiffs claim so that the plaintiffs claim may have a basis that it should be determined at a full trial'.

[11] Next, he proceeded to say that 'Regulation 7 of the Sewerage Services (Charges) Regulations 1994 would envisage that the plaintiff is obliged to state the particulars and basis of calculation of the sewerage services provided to the defendant which the plaintiff had failed to include in the statement to claim. Whilst the omission or failure to include the details itself does not necessarily make the claim unsustainable in law but however where the claim is challenged and denied as in the instant case, the plaintiff is obliged to provide the details in order to sustain the claim for determination at a full trial and this ought to have been done by an affidavit in reply'.

[12] Then he concluded by saying that though it is not denied that the plaintiff is 'the authorized licensed sewerage services contractor and have been authorized by the Minister to demand, collect and retain the sewerage charges under the Sewerage Services Authorisation To Demand, Collect, And Retain Sewerage (Charges) Order 1995... the plaintiff must produce evidence that the sewerages services have in fact been provided to the defendant's premises which is lacking in precision'.

MY REASONS

[13] I shall not take issue with the learned High Court judge over his discretion to hear the appeal despite the amount involved is below RM10,000 except to say that the issue involved in the application is one purely of procedure involving an application to strike out a summons and statement of claim where no affidavit was filed in opposition to the contention of the applicant rather than substantive law involving the legislation mentioned. I do not think that at this stage of the proceeding issue of substantive law is involved. But be that as it may, I shall move on to my reasons for allowing this appeal.

[14] It is not in dispute that the appellant did not file any affidavit to rebut the allegations of the respondent listed in the respondent's affidavit filed in support of the application. Indeed, it is well established that in evaluating evidence tendered through affidavit it is necessary where one party makes a positive assertion upon a material issue it is for his opponent to contradict it otherwise it will be treated as an admission by his opponent of the fact so asserted — see *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332; *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533. But is this fatal to the appellant in this instant application?

[15] It is my view that this depends on the nature of the application. A perusal of the application will reveal that the application is grounded on two grounds: (a) the appellant's claim is frivolous and; (b) it is otherwise an abuse of the court's process. These would fall within O 14 r 21(b) and (d) of the ('SCR'). When the application is confined to these two grounds then it is necessary to examine the contents of the respondent's affidavit to determine whether they support the grounds mentioned.

[16] The respondent's said affidavit contains principally three averments: (a) that the appellant did not provide the said services to the respondent's premises and that the respondent has no contractual relationship with the appellant; (b) that the respondent has been advised by his solicitors that the appellant has no basis in law to claim from the respondent and; (c) the respondent was further advised by his solicitors that the appellant does not possess any right to claim from him. I shall first consider the first averment. Basically it boils down to a contention that since the appellant did not provide the said services to the respondent there is no contractual relationship between the parties. When there is no contractual relationship between the parties there can be no cause of action founded on contract. It is my view that if the appellant has no cause of action against the, respondent then the appropriate and proper ground for striking out is O 14 r 21(1)(a) SCR which says: 'it discloses no reasonable cause of action or defence, as the case may be'. This averment certainly does not support the grounds that the appellant's claim is frivolous (as provided for under O 14 r 21(1)(b) of the SCR), and an abuse the court's process (under O 14 r 21(1)(d) of the SCR). To be frivolous, the claim must be paltry or lacking in seriousness. Judging from the contents of the statement of claim, I doubt that the appellant is not serious in pursuing this claim or lack any basis in doing so. And neither could it be said that the appellant has abused the court's process. The appellant as a corporate entity has every right to bring a claim against the defendant for the said services it claimed to have provided the respondent. When it is the respondent's contention that this claim ought to be struck out for disclosing no cause of action then the respondent must state the correct ground provided under O 14 r 21(1) of the SCR rather than using those which are inappropriate and improper where the reason proffered does not justify or support them. When the reason fails to justify or support the grounds relied on then the application ought to be dismissed — see*Ronex Properties Ltd v John Laing Construction Ltd* [1983] 1 QB 398 which is cited locally in *Perwira Affin Bank Bhd v Ahmad bin Abdul Rahman* [1999] 5 MLJ 306. When the application for striking out ought to be dismissed in limine, the failure of the appellant to file an affidavit in rebuttal to the averments of the respondent is irrelevant. The stage for the consideration of this has not arrived. The respondent must first prove to the court that his averment supports the grounds relied on by him for striking out. Failure to satisfy this preliminary step would result in the dismissal of the application without the need to consider other matters.

[17] The difference between the second and third averments of the respondent is very minor. It can be condensed into an assertion that the appellant has no legal right to claim against the respondent. But this assertion, standing on its own without any qualification and explanation is just a bare statement. In order to give effect to it, reason must be supplied. Since no reason followed these two averments giving rise to this bare statement then such averments have to be considered in the light of an

earlier averment in the affidavit which is: since the appellant did not provide the said services, the parties could not have a contractual relationship with each other to permit the appellant to claim against the respondent. When these averments are dependent on the earlier averment and the earlier averment is inappropriate and improper to support the two grounds relied on by the respondent then the application based on these subsequent averments must fail for want of correct ground. The issue of the absence of an affidavit by the appellant to rebut the assertions made by the respondent in his affidavit once again should not have been considered at this stage.

CONCLUSION

[18] It is for the above reasons that I allowed the appeal with costs here and below.

Zaleha Zahari JCA:

[19] I have had the advantage of reading the draft judgments of James Foong JCA and Heliliah JCA and am in agreement with the conclusion that this appeal be allowed with costs and would like to add the following.

[20] On 30 January 2003 the appellant's instituted proceedings in the Seri Manjung Magistrate's Court claiming a sum of RM1,074 for non-payment of charges in respect of sewerage services provided by the appellant, which claim the respondent disputed. The respondent filed a five paragraph statement of defence on 17 April 2003. He took issue that the appellant had provided sewerage services to his premises, denied owing the sum claimed, contended that there were no unsettled bills, and further contended that the claim instituted against him was 'frivolous' and that it warranted a dismissal.

[21] Pausing here for a moment, the appellant's claim is premised on statutory grounds. Prima facie, the exercise of a statutory duty to collect unpaid dues conferred by law by way of legal action cannot in any circumstance be said to be 'frivolous' nor fall within the 'abuse of court' category. Such a claim when filed, could not at that stage, be said to be 'obviously unsustainable'. There clearly was a joinder of issues consequential upon the respondent filing his statement of defence (O 14 r 20(1) and (2) of the SCR). Did the appellant in fact provide the sewerage services in issue to the respondent? If so, for what period and what is the quantum payable? These issues are subject to proof by the appellants.

[22] The respondent however attempted to have the suit instituted against him to be disposed of summarily. On 19 June 2003 the respondent filed encl (8), an application to strike out the appellant's summons and statement of claim pursuant to O 14 r 21 of the SCR where he repeated the contentions in his defence, that the action against him was 'frivolous' and added another ground, that of 'an abuse of process'. I have carefully perused the respondent's affidavit affirmed on 19 June 2003 filed in support of the striking out application. It did not contain anything additional to what was stated in the defence: That he had never requested the appellant to

provide sewerage services to his premises, denied the existence of a contractual relationship with the Appellant, and then states to being advised by his solicitors to there being no cause of action against him.

[23] The appellant did not file any affidavit-in-reply. From the record no explanation was given as to why the appellants did not do so. Taking into consideration the stand and what transpired in the courts below, it is safe to conclude that it was due to an oversight. What is clear is that the Appellant never intended to admit the assertions, however short and meager it may be, in the respondent's affidavit filed in support of the striking out application.

[24] The respondent's striking out application was dismissed by the magistrate on 2 October 2003. Notwithstanding the absence of an affidavit-in-reply, the magistrate was not minded to allow the suit to be struck out summarily on the technical ground of deeming the assertions of the respondent's affidavit, (in terms as the defence) as having been admitted by the appellants. By the dismissal of the application, it can be concluded that the magistrate was not persuaded by the respondent counsel's submissions that the appellant's claim was a frivolous and an abuse of process. In other words that there were bona fide issues to be tried in this case.

[25] The respondent filed a notice of appeal to the High Court. By reason of the subject matter of the suit instituted against the respondent being only RM1074, far below that set by s 28 of the Courts of Judicature Act 1964 ('the Act'), it was incumbent upon the respondent to raise a question of law. The underlying principle in s 28(1) of the Act is clearly to limit rights of appeal over trivial amounts only upon a point of law. Rights of appeal are purely creatures of statute. A High Court cannot entertain any which cannot be brought strictly within the statutory limits.

[26] It is to be noted that the High Court judge had correctly, in the first part of his judgment, ruled of the necessity for a question of law to be raised for the appeal to proceed by reason of the plaintiff's claim being below RM10,000 and therefore barred by s 28(1) of the Act. The learned judge then, upon considering the six questions posed by the respondent in the notice of appeal, accepted them as 'questions of law' relating to the Sewerage Services Act 1993 read together with the Sewerage Services (Charges) Regulations 1994 and answered them as set out in his judgment. He then allowed the appeal and struck out the appellant's suit. The question here is whether the learned Judge was right in accepting the six questions formulated as questions of law and thereafter in issuing the order of striking out.

[27] My views on the six questions formulated by the respondent in the notice of appeal are these. I would firstly like to make some general observations. Four of the questions posed (Question 1,2,3 and 5) are clearly intertwined, inter related and overlapping as they all relate to the non-filing on the part of the appellant of an affidavit-in-reply to the respondent's affidavit filed in support of the striking out application. The first question being, 'whether the plaintiff is in law required to adduce evidence by affidavit to make out a reasonable prima facie cause of action or triable issue of fact when faced with a striking out application by the defendant"?

The second question relates to the application of a case law in respect of a striking application, ie 'whether the magistrate should have applied *Ng Hee Thoong*, that the failure of the plaintiff to rebut or contradict the defendant's assertions that no sewerage services was provided to him constituted an admission of the said fact by the plaintiff?' The third question reads, 'whether in a striking out application by the defendant, the magistrate can order a full trial of the case in the face of the unchallenged affidavit evidence of the defendant that no sewerage services were provided to him by the plaintiff?' The fifth question which also relates to the non-filing of an affidavit-in-reply reads, 'whether in the absence of any affidavit-in-reply by the plaintiff of affidavit evidence to rebut the defendant's assertions that no sewerage services was provided by the plaintiff, the plaintiff is entitled to succeed in striking out the plaintiff's claim?

[28] Only the fourth question formulated makes reference to a law and regulations, ie the Sewerage Services Act 1993 and the Sewerage Services (Charges) Regulations 1994. The question posed for the High Court's determination was 'Whether a claim under the Sewerage Services Act 1993 read with Sewerage Services (Charges) Regulations 1994 without stating the particulars on the mode/basis of calculation of the sewerage services is valid or proper in law?' As for the sixth and last question, it is entirely different as it relates to the non-availability of the reasoning of the magistrate in arriving at the decision which he did. It reads as follows, 'whether the magistrate having reserved his decision is required to give reasons for dismissing the defendant's striking out application?

[29] I am of the considered opinion that the four questions posed in relation to non filing of an affidavit-in-reply to a striking out application and the application of a case law to a procedural point of the non-filing of an affidavit-in-reply does not come within the ambit of a question of law within the meaning of section 28(1) of the Act.

[30] As to the application of *Ng Hee Thoong* where it was held that, in evaluating affidavit evidence where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually treated as an admission by him of the fact so asserted, that case relates to the challenge to the service of the notice of demand which was a sine qua non of the foundation of legal liability under the guarantee and the respondent's failure to explain why it had sent the notice to an address other than that which appeared on the guarantee. The court then held, whether the demand was ever made and received was one that had to be resolved at trial. Cognizance must necessarily be given to the usage of the word 'usually' in the judgment, that there may well be situations where it cannot and should not be applied. In my view this is one such case. Consideration must be given to the fact the affidavit in issue in this case merely repeats the contentions in the defence.

[31] The absence of particulars as to the mode/basis of the calculation of the services alleged to have been supplied, in my view, is also not one of law, but again, one of procedure. The absence of particulars as to the mode/basis of calculation of the sewerage services does not, in my view, warrant the drastic step of striking out of

the appellant's claim bearing in mind the principle that pleadings are to contain only a statement in summary form of the material facts relied upon, not the evidence by which those facts are to be proved. A

[32] As to the question of the magistrate having reserved his decision and non availability of his reasoning in dismissing the respondent's striking out application, in my view, this also does not constitute a question of pure law. B

[33] To sum up, labeling all of these questions as 'questions of law' does not metamorphose what is essentially issues of procedure into 'questions of law' of the cited Act and regulations within the meaning of s 28(1) of the Act. In this situation I hold that the learned judge had erred in entertaining the appeal as the questions in the respondent notice of appeal were not 'questions of law' within the ambit of s 28(1) of the Act. C

[34] In answering the questions which the learned judge did, he clearly had entered into the realm of disputed facts which cannot be decided by affidavit evidence. Having regard to the pleadings and based on the brief affidavit of the respondent filed in support of the striking out application, the magistrate was right in not allowing the application and in striking out the suit on the technical ground of there being no affidavit-in-reply. There clearly are bona fide triable issues. This is not a plain and obvious case where the summary process under O 14 r 21(1) of the SCR should be invoked. Whether the appellant did in fact provide the sewerage services in issue to the respondent, and if so, for what period, and the quantum payable which can only be resolved by taking viva voce evidence at trial. The decision of the High Court is accordingly set aside and decision of the magistrate restored. The appellants will have the costs of this appeal and in the High Court. The deposit to the appellants. D E F

Heliliah JCA:

[35] We have allowed this appeal. I have had the opportunity of reading the judgments of my learned brother James Foong JCA and my learned sister Zaleha Zahari JCA in draft and I agree with their conclusion. However I wish to proffer other reasons for allowing the appeal. G

[36] This is an appeal by the appellant/plaintiff against the decision of the High Court judge. The High Court judge in allowing an appeal lodged by the respondent/defendant against the decision of the magistrate below has reversed the decision of the magistrate in dismissing the respondent's/defendant's application to strike out the appellant's claim. Hereafter the appellant is to be referred as the plaintiff and the respondent as the defendant. H

[37] At the outset it is noted that the learned High Court judge had made a determination that although the plaintiffs claim in the magistrate's court pertained to an amount which was not within s 28 of the Court of Judicature Act 1964, the appeal by the defendant was nevertheless allowed to be heard on the ground that it was I

A treated as having raised questions of law concerning the Sewerage Services Act 1993 read with the Sewerage Services (Charges) Regulations 1994.

THE PLAINTIFF'S CLAIM

B **[38]** The plaintiff had commenced proceedings against the respondent on 30 January 2003 to claim a sum of RM1,074 being the charges that were due and owing by the defendant. The plaintiff claimed that as a licensed sewerage contractor appointed pursuant to para 2 of the Sewerage Services (Authorisation of Collection of Charges) Order 1994 it was authorised to demand, collect and retain sewerage C charges as prescribed under the Sewerage Services (Charges) Regulations 1994 in respect of the services mentioned therein with effect from 2 April 1994 till the 31 March 2002 in the Federal Territory of Kuala Lumpur. The authorisation was published under PU (A) 115/1994. The order was made pursuant to s 30(2) of the Sewerage Services Act 1993 ('the SSA 1993').

D **[39]** The defendant had filed a defence dated 17 April 2003 in which it was denied that services were rendered. On 16 June 2003 the defendant filed an application to strike off the writ and statement of claim pursuant to O 14 r 21(1) of the SCR. The defendant alleged in the grounds for application to strike out that the plaintiffs claim was frivolous and was an abuse of process. The application was denied and this E went on appeal to the learned High Court judge.

[40] It is not disputed in the present appeal that upon the defendant filing their defence and before any further steps was taken the application to strike out was made. The plaintiff on the other hand has also conceded that no affidavit in reply was filed F in response to the affidavit filed in support of the application to strike out and no reasons were also give for the absence of any application to file a further affidavit. A different counsel had appeared for the plaintiff in the courts below.

THE LEGAL ISSUES IN THIS APPEAL

G **[41]** Six legal issues were put to the learned High Court judge in dealing with the appeal from the decision of the magistrate in dismissing the application to strike off.

[42] The six issues were dealt with as questions of law. However it is unnecessary H to deal with them separately in this appeal as they are really interwoven. The issues pertain to the apparent failure of the plaintiff/appellant to furnish further and better particulars of their claim as well as the failure to file an affidavit in reply to the affidavit in support of the application to strike out.

I **[43]** The statement of principles underlying the court's discretion in an application to strike out pursuant to O 18 and O 19 of the Rules of the High Court 1980 (equivalent to O 14 and O 21 of the SCR have been defined in several of the cases cited by both learned counsels for the plaintiff and defendant. Particular references were made to *Honan Plantation Sdn Bhd v Kerajaan Negeri Johor & Anor and another appeal* [1998] 2 MLJ 498, *Pengiran Othman Shah bin Pengiran Mohd Yusoff & Anor*

v Karambunai Resort Sdn Bhd (formerly knownas Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 MLJ 309, *Bandar Builder Sdn Bhd & Ors v United Malaya Banking Corporation Bhd* [1993] 3 MLJ 36. These cases alongside several others determine that a court will not accede to an application to strike out an endorsement or pleading unless there is a clear case for making out one of the grounds. The approach is founded on the judicial policy to afford a litigant an opportunity or a right to institute a bone fide claim before courts and whenever possible courts will permit the plaintiff to proceed with the action.

[44] The parties to the present appeal have for reasons not elucidated agreed that the application to strike out would proceed on the basis that the plaintiffs claim is to be considered as vexatious and frivolous and hence amounted to an abuse of the process of the court. The words frivolous or vexatious have been defined to mean cases which are obviously unsustainable or wrong: *Re AG of Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274. At the root of the defendant's allegations that the plaintiff's claim was unsustainable was the alleged omission to provide further and better particulars and failure to file an affidavit in reply whereupon it was urged and accepted by the learned High Court judge to be fatal to the case.

[45] In the circumstances of this appeal there was only one affidavit filed in support of the application to strike out. The decision by the learned High Court judge that the failure to file an affidavit in reply had resulted in the plaintiffs claim being fatal was founded on the basis of the judicial proposition in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 per Gopal Sri Ram CJA at p 286 stated:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; *Overseas Investment Pte Ltd v O'Brien* [1988] 3 MLJ 332.

[46] While it may be the case that the failure to file an affidavit in reply has not been explained I am of the view that the court is not precluded from examining the statement of claim. Various passages in *Bandar Builder* (at p 43 per Mohamad Dzaiddin SCJ) (as he then was) and *Honan Plantation Sdn Bhd v Kerajaan Negeri Johor* (at p 501 per Gopal Sri Ram JCA) may be referred. In the former case the passage is as follows:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co*). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v Moloney & Ors*). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari material with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd v*

Wilkinson, Heywood & Clark Ltd). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[47] In the grounds in support of the application to strike out the defendant appeared to have raised the question of the plaintiff not having a legal basis to lodge a claim against the defendant. The records of appeal also disclosed that several submission pertain to the application of the SSA 1993. The challenge posed by the defendant to the plaintiffs claim in effect relates to the implementation of that legislation and hence there are indeed issues of law to be considered.

[48] In the circumstances of the present appeal judicial notice is taken of the following:

(i) Section 30(2) of the SSA 1993 whereby the Minster is empowered to authorise a sewerage services contractor with whom an agreement has been entered into under s 7 of the same Act to demand, collect and retain sewerage charges prescribed under the same section.

(ii) Pursuant to the same section an order was made authorising Indah Water Konsortium Sdn Bhd (the plaintiff appellant to demand, collect and retain sewerage charges prescribed under the Sewerage Services (Charges) Regulation 1994. These regulations appear in PU (A) 115/1994 and have since then been amended from time to time but overall there is a schematic method of imposing and determining charges for certain services.

[49] Pursuant to the SSA 1993 there was gazetted, vide PU (B) 567 of 1994, the dates of coming into force of ss 4, 5, 6 of the SSA 1993 in respect of certain areas which includes, inter alia, the Manjung District Council area.

[50] It is noted that the SSA 1993 is a piece of legislation that has the object of consolidating the laws relating to sewerage system and services throughout Malaysia. Section 7 of the said Act is an enabling provision that empowers the Federal Government to enter into an agreement with any sewerage services contractor and thereby authorising the latter to provide, inter alia, sewerage services.

[51] It is further noted that in para 3 of the statement of claim filed by the plaintiff there are specific references to the said legislation although the powers under which the plaintiff has purported to act may have been made generally. Reference is made to s 57(1)(a) of the Evidence Act 1950 which provides that a court shall take judicial notice inter alia, of 'all laws or regulations having the force of law now... in force... in Malaysia or any part thereof. Under the Interpretation Acts 1948 and 1967 s 3, the word 'law has the meaning assigned by art 160(2) of the Federal Constitution' wherein 'Law' includes written law. Regulations are included within the definition of subsidiary legislation as instruments having legislative effect.

[52] In *Sarkar on Evidence* (15th Ed) at p 1021 the following statement is found: **A**

> That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. But the opponent is not prevented from disputing the matter by evidence, if he believes it disputable.

B

[53] In *Saminder v Public Prosecutor* [1972] 1 MLJ 28 Mohammed Azmi J (as he then was) observed:

> Under s 57(1)(a) of the Evidence Ordinance, the court is bound to take judicial notice of all laws or regulations having the force of law now or heretofore in force or hereafter to be in force in any part of the Federation. The term 'law' is defined both by art 160(2) of the Federal Constitution and Item (43C) of s 2(1) of the Interpretation and General Clauses Ordinance 1948 to include written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or in any part thereof. 'Written law' is defined by Item (97) of the Interpretation and General Clauses Ordinance 1948 to mean all Ordinances and Enactments in force in the Federation or any part thereof and all subsidiary legislation made thereunder, and includes the Federal Constitution. The term 'subsidiary legislation' is further defined by Item (88) of the said sub-section to mean any Order in Council, proclamation, rule, regulation, order, notification, by-law or other instrument made under any Act of Parliament, Ordinance, Enactment or other lawful authority and having legislative effect.

C

D

E

[54] It is also noted that over the past years several services provided by the government have been undertaken through the mechanism of privatisation agreement. Under such agreements various entities may be vested with various enabling powers including those vested through delegated legislation. Having regard to the provisions of the SSA 1993 cited above the plaintiff is one such entity. Section 7 of the SSA 1993 is one such provision. The court takes notice of PU(A) 116/1994 whereby the plaintiff has been authorised as a licensed sewerage services contractor to demand sewerage charges. It cannot be the case as contended by the defendant that the plaintiff had averted to contractual provisions. The plaintiff here has been vested through statutory provisions and an agreement with the government to discharge certain services to the public.

F

G

[55] Nevertheless it is also relevant to refer to s 40 of the Interpretation Acts 1948 and 1967 which provides:

> 40 (1) Where a written law confers a power on any power to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are *reasonably necessary to enable the person to do or enforce the doing of the act or thing.*
>
> (2) Without prejudice to the generality of subsection (i) —
>
> (a) ...
>
> (b) ...
>
> (c) where a power is conferred on any person to direct, order or require any act or thing to be done *there shall be deemed to be imposed on any person to whom a direction, order or requisition is given in pursuance of the power a duty to comply therewith.* (Emphasis added.)

H

I

[56] An analysis of the aforementioned by itself would suffice to indicate that the denials raised by the defendant to the statement of claim could not simply be resolved by affidavit evidence. These matters are indeed triable matters. The plaintiff in particular had made a reference to an account number which is simple terms could not have been concocted out of thin air in any case. The statement of claim per se does not reduce the claim of the plaintiff to something that is manifestly unsustainable so as to amount to an abuse of process.

[57] In the memorandum of appeal another issue has been canvassed and this has spurred learned counsel for the defendant to contend that since it was not raised before, this court would be precluded from addressing the matter. The issue again relates to the alleged failure of the plaintiff in the filing of a reply to the defence that has been filed by the defendant. The memorandum of appeal has made references to O 14 r 20(1) r 20(3) of the SCR. Order 14 r 10 stipulates that a reply is needed for purpose of compliance with O 14 and if no reply is served r 20(1) operates and is to be read with O 14 r 20(3) of the SCR.

[58] With regard to the contention of the learned counsel for the defendant that this point has not been raised before it is found that this similar point was addressed in *Luggage Distributors (M) Sdn. Bhd. v Tan Hor Teng* [1995] 1 MLJ 719. There was a discussion there on the effect of rr 18(2) and 21(1) of the Rules of the Court of Appeal 1994. In the present appeal the memorandum of appeal has included a point that was not canvassed earlier namely the point pertaining to O 14 r 20(1) and (3) of the SCR. The judgment of Gopal Sri Ram JCA discussed a similar position at p 739:

> Encik Thomas, in support of the motion, relied on rr 18(2) and 21(1) of the Rules of the Court of Appeal 1994, and submitted that this court has an untrammelled discretion even to decide a case on a ground nor raised in the memorandum of appeal. He also referred to the recent and as yet unreported decision of this court in *Cheow Chew Khoon v Abdul Johari bin Abdul Rahman* Civil Appeal No A–02–2–94 (since reported in [1995] 1 MLJ 457) where my learned brother, VC George JCA, referred to these Rules in the context of an appeal from a refusal by the High Court to set aside a judgment in default.
>
> In opposing the application, Encik Das cited two cases decided by the Supreme Court. They are*Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 and *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428. Reference may also be usefully made to the judgment of Maclntyre J in *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1991] 2 MLJ 9 at p 16 (FC). All these decisions are plainly binding on us. They establish the principle that save in exceptional cases, an appellate court will not entertain a point not raised in the court below. The exceptions include a plea of illegality which may be taken for the first time at the appellate stage.
>
> Encik Thomas submitted that the exceptions adverted to in the aforementioned cases are illustrative but not conclusive. I think that submission is correct. In my judgment, the categories of cases in which an appellate court will admit a new point are not closed. The governing principle is this: an appellate court will permit a new point to be raised for the first time before it where the interests of justice so require. The question whether the interests of justice are met in a particular case depends on the peculiar facts of that case. The factors for and against the admission of the new point must be weighed on a balance to see where the justice of the case lies.

[59] The earlier case of *Cheow Chew Khoon v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457 also contained a similar discussion and certain parts of the decision that dealt with the same point raised above may be cited, per VC George JCA (as he then was) at p 488:

> Rule 5(1) of the Rules of the Court of Appeal 1994 provides that appeals to the court shall be by way of rehearing. Rule 7 sets out the powers of the court and sub-rr (4) and (5) thereof are as follows:
>
> (4) The court may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.
>
> (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and such powers may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties have not appealed from or complained of the decision.
>
> Rule 18(1) provides for the appellant to set down in a memorandum of appeal the grounds of appeal. Then comes r 18(2) which provides that while the appellant may not without the leave of the court rely on any ground of appeal not included in the memorandum of appeal, '... but the court in deciding the appeal shall not be confined to the grounds set forth by the appellant'.
>
> In England, the grounds of appeal are set out in the notice of appeal. The powers equipollent to our Rules of the Court of Appeal 1994 rr 7 and 18(2) are in their r 10 of O 59. (In an earlier edition of the Rules of Supreme Court they were in the rules to Order LVIII.) Sub-rules (3) and (4) of r 10 are as follows:
>
> (3) The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require.
>
> (4) The powers of the Court of Appeal under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the court below or by any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice; and the Court of Appeal may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties.
>
> In *Purnell v Great Western Railway Co* (1876) 1 QBD 636 at p 640, Jessel MR with reference to the provision that appeals before the Court of Appeal are by way of rehearing said:
>
> > The question now is, what are the powers of the Court of Appeal? Under Order LVIII r 2 it will be found that appeals to the Court of Appeal are to be by way of rehearing, that is, it is not to be confined to the points mentioned in the notice of appeal.
>
> Another illustration of the wide powers given to the Court of Appeal is provided by the English case, *A-G v Simpson* (1901) 2 Ch 671 at pp 713 and 720. The court below had, inter alia, held that the defendant was entitled to collect a toll from the users of a river which right it held, exits independently of the obligation to repair or maintain the lock or stanch in the river under the control of the defendant. This lock is referred to in the judgment as the St Ives stanch. The plaintiff appealed various aspects of the judgment but not in respect of the above finding. The Court of Appeal however dealt with the issue although there was no appeal in respect of it, Vaughan Williams LJ saying at pp 712–713:
>
> > Secondly, as to the St Ives stanch, I think the defendant Simpson is only entitled to the tolls so long as he keeps the stanch in such repair as to render the river navigable.

A I think that under Order LVIII r 4, we can make the proper declaration notwithstanding that there is no appeal by the plaintiffs against so much of the judgment as declares that the defendant is not bound to repair and maintain the works.

Stirling LJ said in respect of this at p 720:

B I agree as to the stanch below St Ives with what had been said by Vaughan Williams LJ.

I think that this court ought to exercise the power conferred by Order LVIII r 4, namely, 'to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require'. The order confers power to do this, although the appeal may be from part of the judgment only, and although the respondent may not complain of the decision.
C

Clearly the Court of Appeal, both in England and here, is conferred with the power to make orders that the justice of the matter calls for, even in respect of matters not appealed against or raised as a ground of appeal.

D **[60]** There is however here not an entirely new ground. The contention that there is now a joinder of issues on the claims of the plaintiff in respect of which a reply was not filed in response to the defence filed by the defendant has become implicit in the present proceedings. Ong CJ (Malaya) (as he then was) in *Lecthumi & Anor v Asia Insurance Co Ltd* [1972] 2 MLJ 105 at p 107 stated:

E An omission at the trial by in advertence or otherwise to canvass an arguable point is not the same thing as abandoning it altogether - which would have precluded us from reopening and reconsidering the matter.

F **[61]** Here the situation arose from the lack of response or the failure to provide details as contended. It cannot be said that the plaintiff has not established facts which are necessary for the purpose of formulating a complete cause of action. It is not a case here of conflicting affidavits but one alleged to be for a lack of it. Neither has the plaintiff sought a summary judgment. The Court of Appeal in *Tan Kim Hor v Tan Heng Chew* [2003] 1 MLJ 42 in dealing with the issue of striking out has again
G reiterated the judicial policy at pp 506–507 per Richard Malanjum, JCA (now CJ (Sabah and Sarawak)):

Indeed, 'in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit' (see *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212). But having said the foregoing, we are well aware that it is allowable even at an interlocutory
H stage for the court to examine affidavit evidence and to come to certain finding where 'such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable' (per Mohd Azmi SCJ at p 408 in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400). However, it has to be borne in mind as
I well that the 'principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously insustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co* [1892]

3 Ch 274). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v Moloney & Ors* [1965] 1 WLR 1238; [1965] 2 All ER 871). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3 (which is in pari material with our O 33 r 2 of the RHC) (see *Hubbuck & Sons Ltd*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable' (per Mohamed Dzaiddin SCJ (as he then was) at p 43 in B*andar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36). Although the foregoing principles were stated in relation to an application pursuant to O 18 r 19 and not in the exercise of common law inherent jurisdiction, in our view there should be no distinction.

[62] The learned High Court judge has treated the matter as though the claim of the plaintiff must necessarily be resolved by a trial on affidavit and accordingly exercised his discretion.

[63] It is not a discretion that is absolute. The Federal Court's decision of *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 has dealt with the point of reviewing questions of discretion. Abdoocader J (as he then was) in delivering the judgment of court said (at p 151):

There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere 'measuring cast' or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Charles Osenton & Co v Johnston* at p 148 per Lord Wright). The Privy Council held in *Ratnam v Cumarasamy & Anor* that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to *Evans v Bartlam*.

The House of Lords, approving the decision of the English Court of Appeal in *Ward v James*, held to the same effect in Birkett^y (at pp 317, 326). For good measure, we would refer to the felicitous expression of Goulding J, in *Re Reed (a debtor)*, on this point (at p 25):

> ... the duties of an appellate court in such a matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has applied a wrong principle, or has taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account.

[64] As hitherto observed no explanation has been furnished for the alleged omission to file a reply to the affidavit affirmed in support of the application to strike. However it is found here that in the exercise of the discretion to strike out the claim the learned High Court judge has failed to have due regard to the legislation that has been relied upon as the basis of the plaintiffs claim. It therefore warrants an intervention by the court in the interests of justice. Consequently it is decided that

this appeal is to be allowed with costs here and below. The judgment of the learned High Court judge is set aside. The decision of the magistrate is affirmed.

Appeal allowed.

Reported by Sally Kee